NO. 47318-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAMES MAJORS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge

CORRECTED BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Cases

Rules

Other Authorities

A. ASSIGNMENTS OF ERROR

1. Defense counsel provided ineffective assistance by failing to object to the admission of unwarned statements Mr. Majors made in response to custodial interrogation.

2. Defense counsel's failure to object to unwarned statements likely encouraged the jury to find Mr. Majors guilty.

3. The trial court erred by cutting short Mr. Majors's cross-examination of Officer Peters in which he sought to impeach the officer for bias and to correct the state's selective and misleading account of Mr. Majors's conversation with police.

4. The trial court improperly limited Mr. Majors's cross-examination of Officer Peters.

5. The trial court's limiting Mr. Majors's cross-examination of Officer Peters prevented Mr. Majors from impeaching Officer Peters's bias and prejudice.

6. The trial court incorrectly ruled that certain statements of Mr. Majors's to Officer Peters were inadmissible hearsay.

7. The trial court misapplied the rule of completeness to limit Mr. Majors's cross-examination examination of Officer Peters.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did defense counsel provide ineffective assistance of counsel by failing to object to the admission of unwarned statements Mr. Majors made in response to custodial interrogation?

2. Did the trial court err by ruling the Mr. Majors was not entitled to question the arresting officer about exculpatory statements Mr. Majors made after his arrest when answers to those questions (1) prove the officer's bias and (2) rectify the state's selective and misleading account of Mr. Majors's conversation with police?

C. STATEMENT OF THE CASE

Neil Falkenburg works as a property manager for a vacant, boarded-up building in downtown Olympia owned by the Views on Fifth Avenue LLC. RP[1] 17, 71-72. The morning of November 10, 2014, while checking on the building, he noticed a door on the building's west side was ajar. RP 18, 72-73. He also noticed that a boarded-up window on the east side of the building had been disturbed. RP 73-74. He went inside to look around and rode the elevator to the ninth floor. RP 75. When he got off the elevator he saw two people in sleeping bags. RP 75. He took the elevator back down to the first floor and called the police. RP 75.

[1] "RP" refers to the trial verbatim report of proceedings. "RP Sentencing" refers to the verbatim prepared for resentencing.

Several police officers responded to the call. RP 16-17, 75-76. Mr. Falkenburg went back up to the ninth floor with two officers. RP 19, 76. He did not recognize the men in the sleeping bags and had not given either of them permission to be in the building. RP 76-77.

Olympia police officer Michael Peters was one of the officers who accompanied Mr. Falkenburg to the ninth floor. RP 19. Officer Peters asked the two men to identify themselves, and they did. RP 21. One of the men was the defendant, James Majors. RP 21. Officer Peters asked the men what they were doing. Mr. Majors, who is homeless, said he had slept in the building overnight to get out of the rain and stay warm. RP 21-22.

Officer Peters handcuffed both men and escorted them downstairs and to separate patrol cars. RP 22. He placed Mr. Majors under arrest for criminal trespass and searched him. RP 22. During the search, he found a crumbled, cardboard cigarette box in Mr. Majors's inside left jacket pocket. RP 22. Inside the box he discovered a small, clear, two-inch zip-lock bag that contained .06 grams of a white crystalline substance that he believed was methamphetamine. RP 22-23, 69-70.

Before reading any *Miranda* warnings to Mr. Majors, Officer Peters took the substance out of the box and showed it to Mr. Majors. RP 23, 110. In response, Mr. Majors shrugged his shoulders and let out a loud sigh. RP 24, 113. This behavior signaled to Officer Peters that Mr. Majors

knew he had been caught, and he interpreted the conduct as akin to the statements "Oh he found it" and "I'm in trouble." RP 113. The response conveyed Mr. Majors's ownership of the substance to such a degree that Officer Peters had no reason to ask further questions about whether the substance was his. RP 47, 112-13. Only then did Officer Peters read Mr. Majors *Miranda* warnings. RP 24.

In the ensuing conversation, Mr. Majors made a mix of both inculpatory and exculpatory statements. RP 24-25, 38-41. During this conversation, Officer Peters showed Mr. Majors the substance again and asked him what it was. RP 24. Officer Peters stated that Mr. Majors responded, "I don't know. Maybe meth." RP 24. Mr. Majors testified he never identified the substance as methamphetamine. RP 101. Mr. Majors also admitted that the *cigarette box* was his. RP 25. But Officer Peters never asked—and Mr. Majors never said—whether the substance found inside the box belonged to him. RP 38-39, 47, 112-13. Indeed, he told Officer Peters that he did not know the methamphetamine was there. RP 40, 101.[2]

During its case-in-chief, the state introduced evidence of the facts described above. However, the prosecutor asked Officer Peters about only

[2] Mr. Majors also said he told Officer Peters, "It's not mine." RP 101. Officer Peters disputed that account. RP 111.

selected parts of his conversation with Mr. Majors. For example, Officer Peters testified that Mr. Majors recognized the substance as methamphetamine and admitted the cigarette box was his. RP 24-25. Officer Peters also testified that Mr. Majors never indicated that he did not know what the substance was and that he never told Officer Peters it was not his. RP 36. However, the prosecutor chose not to ask Officer Peters about Mr. Majors's exculpatory statements, namely, that he did know the cigarette box contained methamphetamine. *See* RP 37, 40.

Mr. Majors cross-examined Officer Peters about the missing parts of their conversation. RP 41-44. His purpose was twofold: first, to remedy any misunderstanding that resulted from the state's partial account of the conversation; and second, to prove that Officer Peters was biased because he had provided a highly selective account of Mr. Majors's post-arrest interview. RP 41-44. However, the state objected to Mr. Majors's line of questioning on the ground that Officer Peters's testimony about the remainder of the conversation would be inadmissible "self-serving hearsay." RP 39.[3] Initially, the court overruled the state's objection. RP

[3] Mr. Majors's line of questioning and the ensuing objection unfolded as follows:

> Q. Okay. Thank you. Turning your attention to the third to last paragraph, last sentence, I believe you earlier testified that Mr. Majors did not indicate that the methamphetamine was not his. Is that correct?

39. However, it agreed to hear further argument during a side bar. RP 39-

40. The prosecutor argued as follows:

> Your Honor, counsel --
> it appears to the State that counsel is trying to get self-serving hearsay in through the witness, specifically that the defendant said I don't know who -- whose that is or I don't know how that got there. I believe the statement specifically that the defendant made was, "I don't know that. I didn't know that meth was in there." The testimony that the witness gave was that he never said that's -- "that's mine," not about the knowledge of whether or not the methamphetamine was in there. This appears to be a backdoor way of the defense getting in the defendant's own statements without the defendant having to testify.
>
> The evidence rules are clear that the State is allowed to introduce the defendant's statements against himself, but

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> A. He did not indicate that the meth was not his. Is that what you're asking? I'm sorry. Double negatives. I got confused.
>
> Q. Let me clarify. I believe your testimony earlier was that Mr. Majors did not tell you that the meth did not belong to him. Is that correct?
>
> A. He did not tell me that the meth did not belong to him, correct. I'm sorry. I'm confused by the wording of your question.
>
> Q. I'll rephrase. Did Mr. Majors tell you that the methamphetamine – or the suspected methamphetamine belonged to him?
>
> A. He did not tell me that it belonged to him.
>
> Q. Okay. Did he tell you the contrary? That it was not his.
>
> A. No.
>
> Q. Okay. Did he tell you that it was not – that he did not know that it was there inside the cigarette box?
>
> Ms. Stone: Object to self-serving hearsay, Your Honor.

RP 37-39.

> the defense is not allowed to introduce the defendant's own statements because it deprives the State of the opportunity to cross-examine the defendant on his own testimony without having to take the stand.

RP 40-41.

Mr. Majors responded that the exculpatory statement was admissible as impeachment evidence and that, under the rule of completeness, it was also admissible to contextualize other statements he made to Officer Peters:

> I guess I disagree with the State's characterization that it's not being used for impeachment purposes. I think the subtext in the State's question of Officer Peters about whether or not he -- the client admitted that it was his opens the door ultimately to whether he knew it was there. They're not identical, but I think they're related enough that it would be to leave the testimony as it stood after the State was finished questioning Officer Peters may confuse the jury about what statements were or were not made. And so it's -- that's really what my argument is to why this question ought to be allowed.

RP 41-42. After an interchange with the court, he elaborated the argument as follows:

> [DEFENSE COUNSEL]: I'm arguing that the witness should be allowed to answer the question on the basis that it either gives context to his prior testimony or impeaches his prior testimony. *I think that the jury would be left with a misleading impression that my client made no statements regarding the presence of or ownership of or dominion and control of the suspected methamphetamine based upon the State's questions, and that's false.* He did make a statement, and it is if not directly contradictory to what Officer Peters testified to, certainly indirectly contradictory.

> THE COURT: But isn't that exactly how the evidence rules work, that the State's witness does get to testify as to statements that are against your client's interest but not those that are favorable to your client?
>
> [DEFENSE COUNSEL]: Yes, except that there is -- and I don't have a cite for you, but there's a body of law that talks about the State being -- or any party being unable to elicit certain statements against interest that are made within a particular context such that the way that they're presented is misleading to the jury. I'm not -- I wish I had the cite for you on that issue, but I don't. But it's -- I believe what the State would be trying to show or trying to argue later based upon Officer Peters' testimony that my client did not decline to claim ownership over the suspected methamphetamine is that therefore he must have known it was there. I think -- they are certainly indirectly contradictory statements. So it's really -- it's an impeachment issue or a contextualization issue that clarifies what his prior testimony really is.

RP 42-44 (emphasis added).

After considering these arguments, the court sustained the state's objection:

> The Court at this time is sustaining the objection. It appears to the Court that the issue being raised is not necessarily a conflict of potential testimony but different inferences, and I believe that the way the case law is, *the State is allowed to have a witness testify as to hearsay statements that are against the defendant's interest and to essentially leave out statements that are helpful to the defendant as long as they're not contradictory*, and I don't believe that in this context those are contradictory, and so that's the ruling of the Court.

RP 44 (emphasis added).

After the state rested, defense counsel—unable to introduce Mr. Majors's statements in another way—called Mr. Majors as a witness. RP 95-96. Mr. Majors testified that he told Officer Peters that the baggy was not his and that he did not know it was inside the cigarette box. RP 101, 106. He further explained he had picked up what he thought was an empty cigarette box on Fourth Avenue in Olympia so that he could use it to store cigarette butts he retrieved from ashtrays and then emptied and rolled into new cigarettes. RP 99-100. He had no idea there was anything inside. RP 99.[4] The trial court instructed the jury and included an instruction for Mr. Majors's unwitting possession defense. RP 128.

During the state's closing argument, the prosecutor repeatedly emphasized the fact that Mr. Majors sighed and shrugged when Officer Peter's showed him the baggy containing methamphetamine. According to the prosecutor, this conduct indicated Mr. Majors's guilty knowledge:

> And additionally, and we'll get to it in a minute, but as he holds it up before anything he says -- you heard Officer Peters says he holds up the baggy, and the defendant loudly sighs, shrugs and loudly sighs. I would submit to you when he demonstrated it the first time it wasn't -- it was a "I'm not surprised by that," but then he also described it himself on rebuttal as "I've been caught," like, "Oh, yeah. I've been caught."

[4] Mr. Majors also admitted that he slept in the abandoned building, did not have permission to be there, and had a history of using methamphetamine and other drugs. RP 102-08.

RP 139, 159; *see also* RP 147 (referring to Mr. Majors's conduct as a "physical admission"). The prosecutor also called attention to Mr. Majors's prior experience with methamphetamine and the fact that Mr. Majors never denied the drug was his:

> But how does the defendant know that that's methamphetamine? You heard him testify, and you know from his own testimony that he says he -- he's familiar with methamphetamine, and he's been familiar with methamphetamine since 1994. So he has 21 years' worth of experience with methamphetamine. He then expressly admits that the cigarette box containing the methamphetamine is his. And he identifies the substance and he never says -- never says, "That's not mine." Of all the things he says that day, the one thing he doesn't say is "That's not mine," right?

RP 140. During rebuttal, the prosecutor returned to the shrug and sigh, arguing that they amounted to a complete admission of guilt—one that had special value due to their spontaneity:

> And you know, [defense] counsel talked about, like, well, he shrugged and he sighed and whatever. It doesn't really mean anything. And the officer's not going to talk to him. But that's the first thing his body does when he gets caught. His brain has not had an opportunity to process how I'm going to wriggle my way out of this. What am I going to tell the officer? You think about other people you've dealt with in a similar situation, they've been caught doing something they're ashamed of or embarrassed of or they just flat-out know what was wrong, what's the first thing that happens? There's a physical body response. You know that from your common life experience. And then afterwards the brain starts to backpedal and work its way out of it. I would submit to you that's exactly what happened here. You saw the officer (Indicating). And then

> he said well, you know, he wasn't surprised or -- "I've been caught."

RP 157-58.

Mr. Majors's closing argument elaborated his defense—that his possession of the exceptionally small amount of methamphetamine (.06 grams) was unwitting; he had picked up what he thought was an empty cigarette box that happened to contain a tiny amount of the drug. RP 147-48. The jury found Mr. Majors guilty of both unlawful possession of a controlled substance and criminal trespass. RP 166; CP 2-3. Mr. Majors was sentenced to 60 days on the unlawful possession count and 304 days suspended on the criminal trespass count. RP Sentencing 12-13; CP 4. He timely appealed. CP 13.

D. ARGUMENT

1. Introduction

The jury's finding of guilt was based on inadmissible evidence and an intentionally distorted picture of what Mr. Majors said to police after he was arrested. First, while Mr. Majors was under formal arrest but before receiving any *Miranda* warnings, Officer Peters sought a statement from Mr. Majors by showing him a substance found during a search incident to arrest. In response, Mr. Majors shrugged his shoulders and sighed loudly, which Officer Peters and the prosecutor presented to the jury as an absolute admission of guilt on the possession charge. But Mr. Majors's

reaction to being shown the substance was inadmissible under *Miranda* and its progeny. Defense counsel provided ineffective assistance by failing to object to the state's use of this unwarned statement.

In addition, the state based its case on the prosecution's misleading account of a conversation Mr. Majors had with the arresting officer after receiving *Miranda* warnings. By cherry-picking only the most damaging statements from this conversation, the state put forward an account of the conversation strongly suggesting that Mr. Majors had admitted to knowing possession of methamphetamine. When defense counsel attempted to correct the problem by eliciting Mr. Majors's exculpatory statement that he did not know about the methamphetamine inside the cigarette box, the prosecution objected on hearsay grounds, and the trial court upheld the state's objection. But the evidence in question was admissible both to impeach the officer's testimony (a non-hearsay use) and to provide context. Because both evidentiary mistakes involved evidence central to the state's case and likely affected the result, Mr. Majors is entitled to a new trial.

2. Mr. Majors's incriminating shrug and sigh stemmed from custodial interrogation that occurred *before* he received *Miranda* warnings; they were therefore inadmissible.

Both the federal and state constitutions guarantee effective assistance of counsel. *See* U.S. Const. amend VI; Wash. Const. art. I, § 22.

To prove ineffective assistance of counsel, a defendant must first show that trial counsel's performance was deficient. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). "Deficient performance is not shown by matters that go to trial strategy or tactics." *Id.* at 77–78. The defendant must also show prejudice, which requires showing "'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id.* at 78 (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Therefore, to show prejudice, the defendant must show "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78.

a. Defense counsel's failure to object to the state's use of Mr. Majors's unwarned statement constituted deficient performance.

In this case, defense counsel's performance was deficient because he failed to object to the admission of unwarned incriminating statements that stemmed from custodial interrogation.

The Fifth Amendment provides that no "person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V; *Arizona v. Mauro*, 481 U.S. 520, 525, 107 S. Ct. 1931,

1934, 95 L. Ed. 2d 458 (1987).[5] In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Court concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467. The Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444. Those safeguards require the defendant to be advised "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires"—or their equivalent. *Id.* at 479. Statements given without the required warnings are presumed involuntary and must be suppressed. *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755, 1757, 60 L. Ed. 2d 286 (1979).

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[5] Under the Fourteenth Amendment, this privilege also applies in state-court proceedings. *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). Wash. Const., art. I, § 9 states: "[n]o person shall be compelled in any criminal case to give evidence against himself." Washington courts interpret the two provisions equivalently. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285, (1996). For ease of reference, this brief refers to the federal standard.

Two conditions signal that *Miranda* safeguards are needed—custody and interrogation—and both were satisfied in this case.

i. Mr. Majors was in custody.

Custody includes formal arrest or similar restraints on the freedom of movement. *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). In this case, there is no question that Mr. Majors was in custody when Officer Peters held up the baggie of methamphetamine. He had already been handcuffed and escorted to Officer Peters's police car, and was under formal arrest. *See* RP 22-23, 110-11.

ii. Showing methamphetamine to Mr. Majors was the functional equivalent of interrogation.

Interrogation includes not just express questioning, but also "its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980); *State v. Sargent*, 111 Wn.2d 641, 650, 762 P.2d 1127 (1988). Any words or actions on the part of a police officer that he or she should know are reasonably likely to elicit an incriminating response from the suspect are the "functional equivalent" of interrogation. *Innis*, 446 U.S. at 300-01; *Sargent*, 111 Wn.2d at 650-51.

As both the *Miranda* and *Innis* Courts recognized, one of the techniques police commonly use during interrogation is to posit a

suspect's guilt—for example, by confronting the suspect with evidence of a crime. *See Innis*, 446 U.S. at 299. Although this technique does not involve a direct question and need not even be verbal, it is nonetheless a technique police officers should know will likely lead to an incriminating response. *See State v. Nixon*, 599 A.2d 66, 67 (Me. 1991) (showing the suspect a crime-scene sketch was functional equivalent of interrogation); *Weathers v. State*, 105 Nev. 199, 202, 772 P.2d 1294 (1989) (confronting suspect with evidence was functional equivalent of interrogation; noting that "[t]he law recognizes that some kind of reaction, incriminating or otherwise, can be expected from one's being accused of criminal conduct.").

Officer Peters's act of showing the baggie to Mr. Majors was the functional equivalent of interrogation. From context, it is clear that when he showed Mr. Majors the baggie he was seeking a response that would help the prosecution. Indeed, Officer Peters testified that when he held the substance up, he already believed it was methamphetamine. RP 23-24. He also said he showed the substance to Mr. Majors "for investigative purposes," so that Mr. Majors "could identify it to [him] if he wanted to." RP 111-12. Taken together, his testimony indicates that showing Mr. Majors the methamphetamine was a calculated investigative strategy designed to elicit a response, and that Officer Peters expected this strategy

to lead to a response. For that reason, Officer Peters both knew and should have known his conduct was reasonably likely to lead to an incriminating response; his conduct thus was the "functional equivalent" of interrogation under *Innis*.

iii. Mr. Majors's non-verbal response was testimonial

A suspect's response to interrogation also need not be verbal to be a "statement" under *Miranda*. *See* 6 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 6.7(h) (1984) ("Actions by the defendant, not just words, can constitute a 'testimonial communication' so that police actions likely to produce such actions are also governed by *Miranda*."); *Pennsylvania v. Muniz*, 496 U.S. 582, 589, 110 S. Ct. 2638, 2643, 110 L. Ed. 2d 528 (1990) (concluding that the Fifth Amendment applies to non-verbal responses as long as they are "testimonial or communicative" in nature).

To be testimonial, a non-verbal response only needs to explicitly or implicitly "relate a factual assertion or disclose information." *Muniz*, 496 U.S. at 589 (quoting *Doe v. United States*, 487 U.S. 201, 210, 108 S. Ct. 2341, 2347, 101 L. Ed. 2d 184 (1988)). Gestures and exclamations expressing inner thoughts are obviously testimonial. *See Schmerber v. California*, 384 U.S. 757, 761, n. 5, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) ("A nod or head-shake is as much a 'testimonial' or

'communicative' act in this sense as are spoken words"); *State v. Easter*, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996) (concluding silence, looking away, and evasive behavior is testimonial for purposes of the Fifth Amendment); *see also State v. Paschall*, 182 Wash. 304, 307, 47 P.2d 15 (1935) ("We can see no difference in pointing at the appellant ... and in mentioning his name. The gesture may be as eloquent as the spoken word—and as effective.").

Mr. Majors's shrug and sigh represent an incriminating "statement" within the meaning of *Miranda*. Both shoulder shrugs and sighs communicate thoughts and information. The prosecution acknowledged as much, calling them "physical admissions" during closing argument. Indeed, Officer Peters equated the meaning of these acts with the statement "You've got me."[6] Thus, Mr. Majors's response fits comfortably within the *Miranda* framework even though it is non-verbal.

b. Defense counsel's deficient performance likely affected the outcome of the trial.

The erroneous admission of Officer Peters's testimony about Mr. Majors's shrug and sigh likely affected the outcome of the trial. These so-called "physical admissions" were the state's only direct evidence that Mr.

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[6] Mr. Majors argued that the shrug and sigh meant instead, "Oh, shoot. I recognize that that's methamphetamine. I had no idea that was on me. Now I'm going to get in even more trouble." RP 149. Both interpretations presume Mr. Majors's conduct was communicative and testimonial.

Majors was aware methamphetamine was inside the cigarette box, and thus the only way the state could directly refute Mr. Majors's defense that his possession of the drug was unwitting. It is therefore not surprising the extent to which the prosecution called attention to the shrug and sigh during closing arguments. The prosecutor used the shrug and sigh to demonstrate Mr. Majors's guilty knowledge, to attack his credibility, and to discredit his defense. RP 139, 147, 157-59. For example, the prosecutor asked for the jury to reach a guilty verdict on the drug possession count based on both Mr. Majors's "*physical* and verbal admissions." RP 147 (emphasis added). Later, the prosecutor relied on the shrug and sigh to refute Mr. Majors's claim that he did not know the methamphetamine was in the box:

> Because what do people do when they get caught doing something wrong or certainly breaking a law? What might someone do? Tell a half truth or maybe not even tell the truth at all? Do you think that would be unreasonable? Do you think everybody that breaks the law that comes into contact with law enforcement admits it right there or ever admits it? I submit to you that they do not. So assuming this statement was even actually true when the defendant made it, I would submit to you that that's not what it means remotely and that it's contrary to everything else that happened before that and very specifically his physical body reaction which was one that I would also submit was very apparent what that meant and why anybody in the same situation would have interpreted that in exactly the same way.

RP 159.

Aside from the shrug and sigh, none of Mr. Majors's other statements to police suggested he knew there was methamphetamine inside the cigarette case. If the prosecution had not been able to rely on the shrug and sigh, Mr. Majors's unwitting possession defense would have been much stronger. Without the shrug and sigh, a jury is likely to have seen the case very differently. For that reason, trial counsel's deficient performance resulted in prejudice.

3. The trial court erred when it cut off defense counsel's cross-examination of Officer Peters concerning the omitted parts of his conversation with Mr. Majors.

As noted previously, the trial court sustained the state's hearsay objection when Mr. Majors questioned Officer Peters about other statements Mr. Majors made during his post-arrest interview. RP 44. This ruling was mistaken for two reasons. First, the other statements Mr. Majors attempted to introduce were admissible for a non-hearsay use—namely impeachment—because they tended to reveal Officer Peters's biased account of events. Second, the remainder of Mr. Majors's conversation with Officer Peters was admissible under the rule of completeness to counteract the distorted picture created by the state's selective account of the post-arrest interview.

a. Standard of review

Ordinarily, evidentiary rulings are reviewed for manifest abuse of discretion. However, the trial court's ruling in this case was premised on questions of law involving the hearsay rule and the rule of completeness. For that reason, the appropriate standard of review in this case is *de novo*. *See State v. DeVincentis,* 150 Wn.2d 11, 17, 74 P.3d 119 (2003) (court reviews interpretation of evidence rules *de novo*); *State v. Neal,* 144 Wn.2d 600, 607, 30 P.3d 1255 (2001) (court reviews application of hearsay rule *de novo*); *see also State v. Nowinski*, 124 Wn. App. 617, 621, 102 P.3d 840 (2004) (applying *de novo* standard of review when trial court's conclusion turned on whether an evidence rule applied rather than on discretionary decision under an evidence rule).

b. The remainder of Mr. Majors's conversation with police was admissible as impeachment evidence.

The right to cross-examination is fundamental and zealously guarded by Washington courts. *State v. Knapp*, 14 Wn. App. 101, 107, 540 P.2d 898 (1975) (citing *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963), *overruled on other grounds by State v. Land*, 121 Wn.2d 494, 497, 851 P.2d 678 (1993)). Criminal defendants enjoy "great latitude" in cross-examining essential prosecution witnesses to show motive, bias, or prejudice. *Knapp,* 14 Wn. App. at 107 (citing *State v. Tate*, 2 Wn. App.

241, 247, 469 P.2d 999 (1970)); *State v. Dolan*, 118 Wn. App. 323, 327, 73 P.3d 1011 (2003) (right to cross-examine witness for bias is grounded in the Sixth Amendment's confrontation clause). The only requirement is that evidence adduced during cross-examination be relevant to an impeachment ground. 3 *Wigmore on Evidence* (3d ed., 1940) § 943, et seq.

In this case, the trial court analyzed the impeachment value of the evidence incorrectly. The statement Mr. Majors sought to elicit—namely, that he did not know methamphetamine was in the cigarette box—was relevant to show Officer Peters's version of the conversation was biased. It tended to show that Officer Peters was the type of law enforcement official willing to provide a highly selective, strategic, and misleading account to help secure a conviction, even if that meant leaving out details helpful to a criminal defendant. Contrary to the state's contention and the trial court's ruling, this impeachment use of Mr. Majors's statement to police involved no hearsay because the statement is relevant to show bias regardless of its truth. *See* ER 801(c) (defining "hearsay" as an out of court statement "offered in evidence to prove the truth of the matter asserted"). Thus, the trial court erred in concluding that the statement in question was inadmissible hearsay.

c. The statements were likewise admissible under the rule of completeness.

A second basis for admitting Mr. Majors's statement was the rule of completeness. For centuries, the rule of completeness has served to eradicate dubious, truth-distorting trial tactics like the ones used in this case by requiring the proponent of evidence to include all relevant aspects of a conversation, or by allowing the opponent to explore the complete conversation during cross examination. *See generally* Dale A. Nance, *Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence*, 75 Tex. L. Rev. 51, 53-58, 63 (1996). The rule of completeness allows relevant parts of a conversation to be admitted even when they might otherwise be subject to exclusion under another rule of evidence, for example the hearsay rule. *See Id.* at 54-56 (explaining the "trumping function" of the rule). The rule plays an especially important role in the context of criminal prosecutions. Without it, prosecutors would be encouraged to cherry-pick conversations between suspects and police, and remain confidant the defendant will be unable to respond. *Id.* at 54.

Closely related to ER 106, the common-law rule of completeness "is an elementary rule of law that when admissions of one on trial for the commission of a criminal offense are allowed in evidence against him or her, *all that he or she said in that connection must also be permitted to go*

to the jury, either through cross-examination of the witness who testified to the admissions or through witnesses produced by the accused so that the accused may have the benefit of any exculpation or explanation that the whole statement may afford." 29A Am. Jur. 2d Evidence § 772 (emphasis added); *see also* Karl B. Tegland, 5 Wash. Prac., Evidence Law and Practice § 106.4 (5th ed.).[7] Washington's version of the rule provides:

> Where one party has introduced part of a conversation the opposing party is entitled to introduce the balance thereof in order to explain, modify or rebut the evidence already introduced insofar as it relates to the same subject matter and is relevant to the issue involved.

State v. West, 70 Wn.2d 751, 754-55, 424 P.2d 1014 (1967); *State v. Edwards*, 23 Wn. App. 893, 896, 600 P.2d 566 (1979). The remainder of the conversation is admissible for context even if it would otherwise be

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[7] ER 106 and the common-law rule of completeness have two main differences. First, ER 106 appears to apply only to written documents or recordings, not oral conversations. *See* Tegland, 5 Wash. Prac., *Evidence Law and Practice* § 106.4 (5th ed.). That said, many federal courts have interpreted the virtually identical federal counterpart of ER 106 to cover oral conversations as well. *See State v. Larry*, 108 Wn. App. 894, 909-10, 34 P.3d 241 (2001) (discussing application of Rule 106 to oral conversations). Second, ER 106 includes a timing component not present in the common-law rule of completeness. It enables opponents to force the proponents of partial documents or recordings to introduce the entire document or recording during their case in chief—so that the fact finder is able to evaluate the entire document or recording without waiting for cross-examination or a different phase of trial. Because this case involves an oral conversation, under current Washington law it fits squarely under the common-law rule of completeness. Nonetheless, because the oral conversation in this case was written down in Officer Peters's police report, it might also be analyzed under ER 106 and ER 611.

barred by other evidence rules, such as the hearsay exclusion. *See West*, 70 Wn.2d at 755.

As this case exemplifies, the rule of completeness is vital in criminal cases because of the asymmetry of evidence rules pertaining to party-opponent admissions. Under ER 801(d)(2), ordinarily only the prosecution can offer a defendants' out-of-court statements. Thus, without the rule of completeness, prosecutors would be able to pick and choose only the most damaging parts of a defendant's conversation with police and present it to the jury, even if the selective account is misleading. *See* Nance, *supra* at 54-56. Then, under ER 801(d)(2) and the hearsay rule, the prosecution would be able to block all defense references to parts of the conversation that might clarify the prosecution's selective account. *Id.* As Prof. Nance explains, the rule of completeness "vitiates this maneuver by assuring the introduction of all parts of the admission that are demanded by the opponent and that affect the inferences that may legitimately be drawn from the part of the utterance the proponent has chosen to introduce." *Id.*

Without the rule of completeness, defendants would be left with a Hobson's choice: Either rethink the decision not to testify or live with the prosecution's incomplete or distorted account of the statements to police. For this reason, courts and commentators have emphasized the potential

for prosecutorial trial tactics like those in this case to impede courts' truth-finding function or to burden defendants' fundamental right against self-incrimination.[8] When, as in this case, the state offers in evidence a defendant's admissions but omits exculpatory statements that were part of the same conversation, the right to remain silent is burdened; the omission "paints a distorted picture" the defendant "is powerless to remedy without taking the stand." *United States v. Walker*, 652 F.2d 708, 713 (7th Cir. 1981). A fundamental goal of the rule of completeness is to abolish this unfair and truth-distorting trial tactic. *See* Nance, *supra* at 54-56.

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[8] In *Walker*, the court described the problem in the following way:

> In criminal cases where the defendant elects not to testify, as in the present case, more is at stake than the order of proof. If the Government is not required to submit all relevant portions of prior testimony which further explain selected parts which the Government has offered, the excluded portions may never be admitted. Thus there may be no "repair work" which could remedy the unfairness of a selective presentation later in the trial of such a case. While certainly not as egregious, the situation at hand does bear similarity to "(f)orcing the defendant to take the stand in order to introduce the omitted exculpatory portions of (a) confession (which) is a denial of his right against self-incrimination."

Walker, 652 F.2d at 713 (quoting 1 *Weinstein's Evidence* 106-9 (1979)); *see also United States v. Sutton*, 801 F.2d 1346, 1370 (D.C. Cir. 1986) (noting connection between rule of completeness and constitutional right not to testify); Wright & Graham, *Federal Practice & Procedure* § 5077, at 370 (1977); Andrea N. Kochert, *The Admission of Hearsay Through Rule 106: And Now You Know the Rest of the Story*, 46 Ind. L. Rev. 499, 518 (2013) (describing how rule of completeness supports defendants' Fifth Amendment right not to testify).

The rule of completeness does obey certain limits. A party is entitled to introduce the remainder of a conversation only to the extent it is relevant to an issue in the case and necessary to clarify the portions of the conversation introduced. *See State v. Larry*, 108 Wn. App. 894, 910, 34 P.3d 241 (2001) (suggesting, in the context of ER 106, that courts must determine whether the offered portions of the statement are necessary to (1) explain the admitted evidence, (2) place the admitted portions in context, (3) avoid misleading the trier of fact, and (4) ensure fair and impartial understanding of the evidence). The *Larry* test has many overlapping elements; a better phrasing of the rule simply asks whether the statements the defendant is seeking to admit are relevant to an issue in the case and tend to explain, modify, or rebut the evidence previously introduced. *See West*, 70 Wn.2d at 754-55 (explaining analysis under Washington's common-law rule of completeness).

In this case, Mr. Majors was entitled to cross-examine Officer Peters fully about statements omitted from the prosecution's account of Mr. Majors's post-arrest conversation. The state's cherry-picked account was misleading in that it focused exclusively on Mr. Majors's admissions that he owned the cigarette box found in his pocket and knew what methamphetamine looked like. Taken in isolation, these statements produced a misleading impression that Mr. Majors admitted to knowingly

possessing methamphetamine—an inference that directly contradicted his defense. However, the rest of the conversation included his explicit statement that he did not know there was methamphetamine inside the cigarette box. RP 40, 101. A fact finder aware of the *entire* conversation might see the scope of his admissions as more limited, and conclude all of his statements to police were consistent with his unwitting possession defense. Thus, in this case, the part of the conversation offered by the defense was "necessary to explain, modify, or rebut the evidence previously introduced." *West*. 70 Wn.2d at 754-55. For that reason, it was admissible under the rule of completeness, regardless of any hearsay objection. The trial court erred by excluding it.

d. The trial court's erroneous evidentiary rulings were harmful.

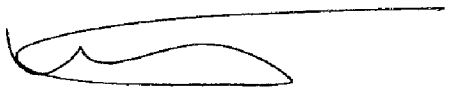
The trial court's evidentiary mistakes harmed Mr. Majors's defense. They resulted in the omission of crucial parts of his conversation with Officer Peters that would have thrown into doubt the officer's credibility as a witness, corrected misimpressions that resulted from the prosecution's selective and distorted account, and reinforced Mr. Majors's credibility. In addition, if his exculpatory statement had been admitted, Mr. Majors might not have had to testify—or might have testified in a different way. For all of these reasons, the trial court's evidentiary mistakes undermined Mr. Majors's defense and were harmful.

E. CONCLUSION

Mr. Majors's conviction for possession of a controlled substance should be reversed. Mr. Majors was convicted based on inadmissible evidence taken in violation of his Fifth Amendment right to remain silent and an incomplete and distorted account of his post-*Miranda* conversation with police. For these reasons, he is entitled to a new trial.

Respectfully submitted on October 29, 2015.

LAW OFFICE OF LISA E. TABBUT



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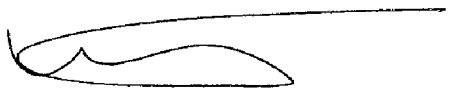
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Corrected Brief of Appellant to (1) Carol La Verne at the Thurston County Prosecutor's Office, Lavernc@co.thurston.wa.us; (2) the Court of Appeals, Division II; and (3) I maintained Mr. Majors's copy in my file until such time as I have contact with him again.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed October 29, 2015, in Winthrop, Washington.



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